APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 65)

PERSONAL INFORMATION

1. **Full Name:** Nicole Clarissa Davis

2. **Have you ever used or been known by any other name?** Professionally, No. **If so, state name:** Exclusively by family I have been referred to as Nicole Ellis.

3. **Office Address:** Department of Economic Security, 1789 W. Jefferson, 4th Floor NE, MDC 1111, Phoenix, AZ 85007

4. **How long have you lived in Arizona?** I have lived in Arizona for 27 yrs. **What is your home zip code?** 85040

5. **Identify the county you reside in and the years of your residency.** Maricopa, 2000 to present (24 yrs).

6. **If nominated, will you be 30 years old before taking office?** ■ yes ☐no

   If nominated, will you be younger than age 65 at the time the nomination is sent to the Governor? ■ yes ☐no

7. List your present and any former political party registrations and approximate dates of each:
(The Arizona Constitution, Article VI, § 37, requires that not all nominees sent to the Governor be of the same political affiliation.)

No Party/Independent. I was raised by my mother in a single parent family. She passed in 2011. To honor her faith and keep peace in the family, I did not register to vote until July 2016, and have voted in every general election since then.

8. Gender: Female

Race/Ethnicity: African American/Black

EDUCATIONAL BACKGROUND

9. List names and locations of all post-secondary schools attended and any degrees received.

University of Arizona, Rogers College of Law, Tucson, AZ – Juris Doctorate
California State University Northridge, Northridge, CA – Bachelor of Arts

10. List major and minor fields of study and extracurricular activities.

Undergraduate

I was the first in my family to begin my collegiate career at a four-year university. It began with a summer bridge program which was designed to increase the likelihood of my college success by creating a foundation for college level work and developing student connections. I found myself situated amongst a group of ethnically, intellectually, and geographically diverse peers studying a rich historical background. The result was that I entered my freshman year as a **Pan African Studies** major. I enjoyed the assigned texts, flourished in class presentations, and began to recognize the significance of communication as its use of language and symbolic systems influenced others and impacted the ongoing development of culture and society. I quickly switched my major to **Speech Communications** and graduated with that emphasis in my bachelor's degree.

To help pay for college, I worked during my college years and took two non-consecutive semesters off. My work included a two-year stint at Motown Records where I increased my ability to understand and navigate **business** situations, risks and opportunities. I liaised between the General Manager and other offices maintaining expenses, general ledgers and other financial records and performed comprehensive basic office management. I worked alongside the Senior Vice President of Artists and Repertoire and President of Custom Labels interacting with artists, managers, producers, and writers on their respective projects. I reviewed incoming demo material and coordinated and assisted with the launch of Motown's jazz and children's entities. Over the same period, I worked at Bally's Total Fitness. What began as general **fitness** enthusiasm took root and amidst grueling training I became a certified aerobics instructor, ACE Certified Personal Trainer, and Co-Captain of the Southern California Reebok Dance Performance Team.

For approximately three years after college, I worked for News Corporation, parent company to 20th Century Fox. There, I was blessed to gain knowledge on the lot about the **entertainment industry** and meet and work for the founder of **navigation systems** and **sports enhancing technology**. It was at News

Corporation that I developed a firm desire to enter law school. I watched lawyers and engineers significantly guide these innovative areas and began to further understand the value of legal education.

Law School

As the first in my family to attend law school, I concentrated my first-year efforts exclusively on my course work and only after obtaining an initial understanding of fundamental legal subjects (contracts, property, civil procedure and the like) did I become active in student organizations like the **Black Law Students Association (BLSA)** and **Unified Students Coalition (USC), University President's Student Advisory Council**. I was elected President of BLSA at the end of my first year. I served as President in my second year, after I had returned from Florence, Italy where, during the summer, I studied for six weeks at the **Florence Institute on International and Comparative Law**. My Florence studies were augmented by weekend tours of Pisa and Cinque Terre where I further experienced Italian culture and customs that helped me better understand our global connectedness. As second year began, I served as a **Teaching Assistant** for the **Gonzales-Villarreal Bridge Orientation Program**, a pre-law school program for first generation law and traditionally unrepresented minority students to develop academic skills needed for law school success, becoming **Co-Coordinator** for the program a year later— my third year. This time also marked my continued service with USC, included membership on the **search committee** for the **Director** of the **University of Arizona's African American Cultural Resource Center**, and coordination for the **Arizona Supreme Court's Project SOAR**—student outreach access and resiliency program— for BLSA. I personally mentored multiple youths at risk for academic failure and who were engaging in high-risk behavior. I graduated in December 1999, a semester early, after completing a daunting 18 credit course load that included an externship as a **Rule 38E Student Certified Criminal Prosecutor**. As a Rule 38E student, I prosecuted misdemeanor cases in Tucson city court, negotiated plea agreements, conducted witness interviews, delivered opening statements and closing arguments, and handled bench trials. I was struck by the complexity of domestic relations experienced during police ride-a-longs and DUI and drug training.

11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.

Undergraduate

I began my undergraduate experience as a seasoned worker. I had been employed for several years in the retail sales industry and continued this work during my first year to help pay for college. I was chosen for my second year to serve in the coveted role of **Resident Advisor** (RA), a paraprofessional in the

Office of Resident Life acting as a mentor and guide to 50 residents living in the dormitory. As an RA, I met monthly with each of my residents, held regular/general dormitory meetings, planned social and academic check-in activities, and staffed the RA front desk every Tuesday for six hours. I took two semesters off (one in each of what traditionally would have been my third and fourth years) to work full time and earn money to pay for college. Thus, for two years, as mentioned in response to question ten, I also worked full- and part-time at **Motown Records** acquiring life lessons that guided my professional work and experiences with marginalized communities and individuals with disabilities including my work with deaf and hard of hearing clients in private practice.

Law School

I entered law school as a returning student. I was older than most of my peers and wrestled, initially, with "how" to again study and specifically how to study "the law." I worked best in the wee hours of the morning and thus often began my studies at 4 am and picked things up again in the evenings. I developed color coded systems to cement my textual understanding, focused my attention on the case details, and took incessant class notes in an effort to capture each, every, and all concepts. I was recognized for my **writing proficiency in moot court**—a first-year introductory exercise that focuses on legal research and writing and courtroom argument skills, and for delivering the **best oral argument** in my **contracts** class. Based on my first- and second-year grades I qualified for the **African American Student Dean's List** and a **Dean's Achievement Award.** Notably—especially for me as I needed to work but was unable to do so during the first year because I sustained a debilitating injury during aerobics just before school started—I was awarded the **Black Alumni Graduate Law School Fellowship** and the **Hayzel B. Daniel's Bar Association Scholarship.** These awards gave me the financial flexibility to accept the prestigious appointment as an **Ares Fellow**—a second year legal research and writing teaching assistant for incoming first year law students. And while it may not be reflected in my academic marks, my injury impacted my studies in significant ways. By illustration, I spent the class sessions of my first year second semester property course on the floor taking notes as I could not sit for prolonged periods in a chair. But I did then as I do now: I found a way.

PROFESSIONAL BACKGROUND AND EXPERIENCE

12. List all courts in which you have been admitted to the practice of law with dates of admission. Give the same information for any administrative bodies that require special admission to practice.

Bar or Other Admission	Dates
Ariona Supreme Court	May 2000
United States District Court, Dist. of Arizona	May 2000
California Supreme Court	May 2001

13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening?

No. **If so, explain.**

b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state?

No. **If so, explain any circumstances that may have hindered your performance.**

14. Describe your employment history since completing your undergraduate degree. List your current position first. If you have not been employed continuously since completing your undergraduate degree, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

- State of Arizona – Department of Economic Security, Phoenix, AZ – Deputy Director, General Counsel & Chief Governance Officer - Jan. 2019 to Present

- State of Arizona – Arizona Health Care Cost Containment System, Phoenix, AZ – Deputy General Counsel - Sept. 2017 to Jan. 2019

- Baskin Richards, PLC, Attorneys at Law, Phoenix, AZ – Member/Non-Equity Partner - Aug. 2014 to Aug. 2017

- State of Arizona – Office of the Attorney General, Phoenix, AZ - Chief Counsel, Child and Family Protection Division; Section Chief Counsel, Civil and Criminal Litigation and Advice, Child and Family Protection Division - Oct. 2008 to May. 2014

- State of Arizona, Office of Governor Janet Napolitano, Phoenix, AZ – Deputy General Counsel - Jan. 2003 to Sept. 2008

- Brown & Bain, PA (currently known as Perkins Coie), Phoenix, AZ – Associate - Aug. 2000 to Dec. 2002; and Summer Associate - 1999

- Part-time employment while in law school and post law school preparing for and taking Arizona and California bar exams – Tucson/Phoenix, AZ - Aug. 1997 to Aug. 2000

- News Corporation – Coordinator, News Technology Group/Executive Assistant, EVP Technology - Los Angeles, CA - Jun./July 1994 to Aug 1997

- Bally's Total Fitness – ACE Certified Personal Trainer/Fitness Instructor - Culver City, CA - Jun./July 1994 to Aug 1997

15. List your law partners and associates, if any, within the last five years. You may attach a firm letterhead or other printed list. Applicants who are judges or commissioners should additionally attach a list of judges or commissioners currently on the bench in the court in which they serve.

- Brandyn Stewart – Sr. Associate General Counsel, Department of Economic Security. Contact information listed in Confidential Section

- Kristin Penunuri – (Former) Associate General Counsel, Department of Economic Security. Contact information listed in Confidential Section.

- Katherine Hanna – (Former) Associate General Counsel, Department of Economic Security. Contact information listed in Confidential Section

- Nicholas Podsiadlik – (Former) Associate General Counsel, Department of Economic Security - Contact information listed in Confidential Section

- Alexandria Powe – (Former) Associate General Counsel, Department of Economic Security. Contact information listed in Confidential Section

- Leslie Ross – (Former) Associate General Counsel, Department of Economic Security. Contact information listed in Confidential Section.

As General Counsel for the Department of Economic Security (Department), my work regularly requires communication with a few key attorneys in the Office of the Attorney General who statutorily represent the Department. Our discussions often include a review of the relevant law, claims presented, potential defenses, factual and documentary discovery, legal strategy and subsequent implications for the

Department. Although these attorneys are ***not*** my partners or associates as those job descriptions are commonly used in private law firms, in all practical respects, these few are my current law colleagues. These individuals are as follows:

- Heather Pellegrino – Section Chief Counsel, Civil and Criminal, Litigation and Advice Section, Child and Family Protection Division, Office of the Attorney General. Contact information listed in Confidential Section

- Anna Dahlquist – Unit Chief Counsel, Civil and Criminal, Litigation and Advice Section, Child and Family Protection Division, Office of the Attorney General. Contact information listed in Confidential Section

- Ann Hobart – Section Chief Counsel, Employment Law Section, State Government Division, Office of the Attorney General. Contact information listed in Confidential Section.

16. Describe the nature of your law practice over the last five years, listing the major areas of law in which you practiced and the percentage each constituted of your total practice. If you have been a judge or commissioner for the last five years, describe the nature of your law practice before your appointment to the bench.

The past five years of my practice and even before focused broadly on health and human services. It encompassed consideration of not less than ten primary social service programs including litigation and employment/personnel related issues. In any given year or indeed month or week, the percentage of time I spend on a given area can range from 100% to 10% percent or less. It is therefore extremely hard to estimate percentages over a five-year period. This is exacerbated by the COVID19 pandemic which required 16-hour workdays for quite some time and for years was all consuming. But, looking at my work collectively for the past five years, I would estimate that pre and early pandemic (i.e., Jan 2019 to mid-2020), 100% of my time was considered as being in the General Counsel role although I performed Deputy Director and governance duties. From mid-2020 to the Spring 2024, it would be 75% General Counsel, 10% Deputy Director and 10% governance. Since then, it is likely 60% General Counsel, 20% Deputy Director and 20% governance.

I was appointed **General Counsel, Department of Economic Security**, in January 2019, and named **Deputy Director and Chief Governance Officer** in mid-2020 at the start of the Global COVID19 Pandemic. I am one of four senior leaders for the Department and my collective work addresses mitigating risks for actions and activities by the Department for over 8,000 employees in service to over three million Arizonans and involving expenditures exceeding $8 billion annually. I rely heavily on my speech communication instruction, litigation training at Brown and Bain, PA, and understanding of government acquired as Deputy

General Counsel to former Arizona Governor Janet Napolitano. Each role taught me to listen carefully, think critically yet quickly, rapidly digest and distill substantial amounts of information, research thoroughly, write succinctly, and respond proportionally. I have been charged with oversight of various projects in the Office of the Director including the concept, design, plan, and staffing for DES' Tactical Operations Command center established to respond to and mitigate the effects of COVID19. These roles do not fit neatly within a job title I hold but I fill them when a need arises.

As Deputy Director I have direct supervision responsibilities over the DES Offices of General Counsel (OGC), Inspector General (OIG), Equal Opportunity (OEO), and Governance and Innovation (GIA), and have recently added Compliance as I work toward engineering an agencywide administrative compliance structure. For OIG I hold monthly business review meetings to help guide their work and address backlogs in investigations and appeals. I am the architect of the Director's Audit Advisory Workgroup which works to identify and recommend internal audit activities needed for the agency. For OEO I review investigations involving allegations of harassment, discrimination and retaliation and render the final agency decision through my delegation from the Director. I have reviewed hundreds of these matters. I designed GIA to bring consistency to administrative policy, address rule making and review, manage public records requests and identify innovative solutions for the delivery of benefit programs. For GIA I review every administrative policy revision as well as agency-proposed rulemaking, rule revisions and mandated five-year rules reviews. I advise on agency-impactful records requests and acquired an agency wide public records system. With GIA, I am working toward a more detailed understanding of the impact of Artificial Intelligence on the delivery of health and human services. This is a snippet of my work in these areas which, as their upline manager, also includes oversight and management of their employee's cultural, user and physical workspace experiences.

As General Counsel, I track, manage, and oversee litigation when the Department is a party, or the proceeding is an organizationally impactful action proposed, noticed, or filed, or when the Department is a clear stakeholder even if not named as a party. This includes matters in either the Arizona state or federal courts but does not include legal actions that are in their initial stages and occurring in one of the Department's programmatic areas responsible for specific division appeals. It also does not include those appeals at the initial tribunal or appeals board that occur in the DES Appellate Services Administration. I further oversee general legal services rendered to or on behalf of the Department that require review or consideration by the DES Director. My practice is far reaching and encompasses most, if not every, aspect of **health and human services** and business matters related thereto for the Department. Framed as the more traditional legal practice areas they are described as follows; however, the subject areas are not inclusive as the Department administers over 60 benefit programs and I have supported a great many of those.

Healthcare Law: A principal focus of healthcare law is the legislative, executive, and judicial rules and regulations that govern the healthcare industry. My practice focuses on the regulatory structure for what are known as other healthcare providers. Most notably, the Department administers a service system through its **Division of Developmental Disabilities** (DDD) that supports individuals with statutorily identified developmental disabilities by providing healthcare coverage that assists them, to the greatest extent possible, in leading self-directed, healthy, and meaningful lives. This includes the Arizona Long Term Care System (**ALTCS**), DDD's Tribal Health Program, and DDD's **Qualified Vendor provider network**. My work involves reviewing the development of qualified vendor contractual agreements and addressing disputes arising out of those agreements, evaluating and subsequently addressing the propriety of DDD's program eligibility determinations, spearheading the review and revision of programmatic policies and rules (for DDD, in compliance with the federal and state regulatory structure for Medicaid, and for providers regulated by DDD), supporting the licensure and/or certification of developmental homes and **home and community based services (HCBS)**, identifying regulatory gaps and working with DDD on legislative remedies, and ensuring compliance with the Health Insurance Portability and Accountability Act and other confidentiality provisions. The pandemic thrust my work for DDD into the **bankruptcy** field. For more than a year I worked tirelessly to mitigate the impact of an HCBS provider's proposed dissolution and the California court's lack of understanding of DDD's regulatory powers to ensure DDD members' health, safety, and transition to new Arizona providers. This included weekly monitoring of the debtor provider's services and discussion with the court ordered patient care ombudsman, educating outside counsel about Arizona's Medicaid and HCBS structure, and drafting the relevant sections of the legal pleading.

Administrative Law (with resulting Appellate Litigation): For context, administrative law practice concerns government action and its regulation of people and business entities. At the Department, my emphasis has been on our disability and welfare programs and health and safety compliance as those are impacted by the creation, promulgation and enforcement of Department rules and administrative policies through the administrative adjudication process. Over the past five years, my day-to-day practice has included personal oversight of over 65 pandemic-related **unemployment insurance** appeals accepted for review by the Arizona Court of Appeals and any subsequently accepted by the Arizona Supreme Court. These matters stem from eligibility determinations, redeterminations, and overpayments. Although my name does not appear as counsel of record on the briefs – the Department's appellate counsel is officially the Office of the Attorney General (AGO) and for some federal claims pending in federal court we retain outside counsel – my work and its impact is known by Department client representatives and the AGO and is undeniable. For perspective, the work

consisted of mastering the complexities of the Coronavirus Aid, Relief, and Economic Security Act, the Continued Assistance to Unemployed Workers Act of 2020, the Consolidated Appropriations Act, the American Rescue Plan Act, the Lost Wages Assistance grant program, sub-regulatory guidance in the form of approximately 100 unemployment insurance program letters issued by the Department of Labor, and traditional program flexibilities augmented by Arizona law and executive orders that supplemented the Department's unemployment compensation pandemic response activities. I functioned as a principal fact finder to and bridge for the AGO who needed a review and collection of documents, information, policy, and procedures to understand the substance and practices of the Department. I personally reviewed pleadings providing substantive comments, guided the development of legal arguments and the presentation of program nuances, mapped the matters to determine any argument inconsistencies, and when the Court of Appeals needed to better understand the volume of work it would receive, appeared pursuant to that order and separately met with Court leadership armed with the respective data to help the Court manage its existing and prospective volume. This is significant because in calendar year 2020 alone, the Department delivered benefits to over 680,000 Arizonans and we anticipated, based on historical data, that approximately 680 matters would consist of claimants who would seek review ultimately with the Court of Appeals.

In addition, I have supported the implementation of new benefit programs like **Emergency Rental Assistance** through programmatic advice and consultation, and shepherded appellate review of DDD eligibility denials in ways similar but not identical to the information provided above for unemployment insurance.

Litigation: I have worked on several significant cases for the Department spanning individual, executive, and employee-based disputes over the past five years. These cases have included **claim and notice of claim evaluations and responses, pre-filing discovery, case strategy, legal motion review, interlocutory appeal proceedings, appellate review**, and if appropriate **settlement of claims**. Non-inclusive examples are as follows:

A **class action** presented as a **wage and hour** violation asserting that the State through the Department mandated but failed to remit payment for overtime wages. The matter had a tortured procedural history with matters addressed by motion filings and included postponement for review by the Arizona Supreme Court of a certified question from the 9th Circuit Court of Appeals. The matter was resolved with an offer of judgment following a favorable ruling denying class certification and avoided a potential nine figure liability.

A case involving the use of **state executive branch authority** to contract and terminate pandemic unemployment compensation funding provided to

states by the federal government. This work, in addition to that discussed above, required an exhaustive review of statutes and regulations **and their interpretation** and a detailed understanding of programmatic application of those regulatory standards.

A case in which I defended the procedural infirmities of a judicial decision that usurped the Department's statutory mandate to protect from release **confidential records** of vulnerable adults for alleged research purposes. The matter resulted in an opinion by the Court of Appeals and a clarifying opinion by the Arizona Supreme Court. The case was returned to the Maricopa County Superior Court and is ongoing. My work in each of these matters was (and is) as partly set out above in the appellate litigation section but more extensive as I worked alongside outside counsel secured by the State in any manner required.

Family Law: The Division of Child Support Services exists within the Department to aid parents and other caretakers who receive child support and those who pay it. My practice in this area has been isolated to addressing judicial concerns created by the **system modernization** and **monitoring federal audit findings** arising as a result of the prior antiquated technology. This includes understanding the statutory and regulatory mandates, collaborating with the client and AGO, delving into technological rules that govern the database programming, and identifying legally appropriate solutions.

Labor and Employment Law: In addition to the wage and hour discussion above, I have provided general advice and consultation to the Department's Leadership team on disciplinary matters, agency remediating corrective actions, the applicability of worker safety regulations, pandemic protocols, use of contractors for staff augmentation, and laws prohibiting discrimination in the workplace (i.e., Americans with Disabilities Act (ADA) compliance). This includes defending and resolving matters involving the Department pending before the Equal Employment Opportunity Commission.

Elder Law: The Department administers the **Adult Protective Services (APS)** program which is responsible for investigating allegations of abuse, neglect, and exploitation of vulnerable adults under state law. My work is primarily focused on reviewing recommended decisions rendered by administrative law judges (ALJ) in the Office of Administrative Hearings, a separate entity, following a contested hearing on an APS substantiated allegation. This can include listening to hearing testimony, reviewing exhibits and video footage, and evaluating findings of fact and conclusions of law made by the ALJ. In each instance, the Department Director issues a decision which I have either written or substantively reviewed.

As Chief Governance Officer I am responsible for directing people and

processes to ensure appropriate controls exist within the Department. The position is a first for the Department, overlapping in part with my work as General Counsel, and as such is evolving. Over the past three to four years, I have worked to identify gaps in our regulatory compliance, internal controls, and business continuity. For the latter, I worked as the **State Emergency Repatriation Coordinator,** built out an **Emergency Planning and Preparedness Administration** within OIG, and delivered a federally required full scale exercise to evaluate the State's ability to aid a large group of American citizens returned from abroad following an international emergent event. My overall goal has been to ensure the Department's readiness (at every level) for the continued delivery of critical services.

17. List other areas of law in which you have practiced.

As noted in response to question 14 above, I have been a practicing attorney for more than two decades. My work spans the government and private sector representing government entities, officials, and agencies including a former Governor and two Arizona State Attorneys General. I have prepared and counseled senior executives on **legislation and policy initiatives**, compliance with **open meetings laws**, spearheaded systemic operational improvements while establishing multi-level strategic partnerships, and worked across Arizona's 15 counties on over 100 **social service programs** (including **child safety** and the accompanying dependency proceedings) with an emphasis on the safety of vulnerable populations and persons serving them in communities throughout the State. I have prosecuted **intellectual property violations,** filed **intellectual property applications,** composed **executive orders, intergovernmental, interagency, service, licensing, and other agreements,** ensured **Family Medical Leave Act and ADA** accommodations compliance, and guided leaders on **extraditions,** executions, and over 600 executive **clemency** petitions. While working in the Office of the Attorney General, I supervised 11 managers with ultimate responsibility for approximately 400 employees located in 22 offices across Arizona. Those personnel included attorneys, paralegals, secretarial and administrative support staff, a division finance director, a division facilities director, an information technology manager, and a special projects person; and resulted in fiscal responsibility for a $32M annual budget.

For Arizona's State Medicaid agency, known as AHCCCS, I have given legal advice and guidance on claims disputes, **public records**, and general litigation as well as **privacy** and **estates and trusts** matters. As principle legal advisor to the Medicaid Office of Inspector General, I aided in the enforcement of **program integrity** standards involving the detection and prosecution of providers, members and managed care organizations for **fraud, waste, and abuse** through advice and representation of the AHCCCS in **administrative** hearings.

My private sector work, both as a partner and associate practitioner, included representing clients in **education funding**, **rulemaking proceedings**, **regulatory compliance**, **public accommodations**, **trademark infringement**, **construction**

defect, **defamation**, **voting rights compliance**, **business torts and contract** cases as well as **labor and employment** and other disputes.

18. Identify all areas of specialization for which you have been granted certification by the State Bar of Arizona or a bar organization in any other state.

None.

19. Describe your experience as it relates to negotiating and drafting important legal documents, statutes and/or rules.

As a practicing attorney for over two decades, I have written countless motions, briefs, and disclosure statements spanning motions to dismiss, quash, and set aside, to petitions for extraordinary relief and actions for declaratory judgment. I have prepared and negotiated protective orders and also developed proposed and final findings of fact and conclusions of law. Some of my most significant writing has been client memoranda that analyzed federal and state statutes and regulations, case law, and sub-regulatory guidance that policy makers, including Governors, Attorneys General, and Directors have relied upon to understand their legal obligations and to determine and implement administrative and executive policy decisions.

As an example, when I served as Deputy General Counsel to Governor Janet Napolitano, I reviewed all matters related to executive clemency petitions. This included a comprehensive review of the conviction proceedings, evaluation of the sentencing imposed, consideration of humanitarian reasons for imposition of a reduced sentence or early release, the individual's behavior while incarcerated that informed any rehabilitation or ongoing public concern, and the gubernatorial recommendation from the Board of Executive Clemency. I met with families, reviewed community support and opposition, and distilled all of the information into memoranda for the Governor's examination. I developed and utilized a standard procedure to ensure that matters involving immediate life and death situations were effectively highlighted and ensured that the Governor was aware of prior actions on similar matters or prior requests.

As Deputy General Counsel, I also wrote executive orders creating and implementing the Governor's Equity in State Contracting Initiative which diversified the State's $6.9 billion spending with increased economic opportunities for women, minority, small and disadvantaged owned businesses. My executive order drafting has extended to proposed revisions to select executive orders issued during the COVID19 pandemic.

For my agency clients, I have negotiated audit findings, complaint resolutions and been the ghost writer of corrective action plans submitted to regulators to address identified gaps in compliance, state work process improvements and increased

efficiency. I have written time limited administrative policies and standard operating procedures for the specialized retention of historical agency records. I have revised rules applicable to program administration and required appeals. Moreover, I have assisted the federal Administration for Children and Families, Office of Human Services Emergency Preparedness and Response with identifying the need for, and revising training tools of, its Repatriation Technical Assistance Center. In an email to all its state partners, the federal Administration expressed its appreciation for Arizona's efforts toward case management process mapping and collaboration in D.C. at the design lab. I am extremely proud of this work as the new Technical Assistance Center is the first of its kind in the 89-year history of the program and will provide critical guidance to states as they manage their contractual obligations.

Further, for the Arizona Court of Appeals, I have coordinated the Department's review of the Department's section of the Arizona Appellate Handbook (versions one and two) and served as the Department's editor to ensure accuracy and cohesion. The newly published volume crystalizes the Department's unique appeals processes in the unemployment insurance compensation and tax, vocational rehabilitation, cash and medical assistance, childcare, child support and aging and disability service areas for the benefit of legal practitioners and the Department's clients they serve.

20. Have you practiced in adversary proceedings before administrative boards or commissions?

Yes. **If so, state:**

a. The agencies and the approximate number of adversary proceedings in which you appeared before each agency.

Equal Employment Opportunity Commission – Approximately 5
Arizona Office of Administrative Hearing – Less than 2

b. The approximate number of these matters in which you appeared as:

Sole Counsel: 0

Chief Counsel: Approximately 5

Associate Counsel: 2

21. Have you handled any matters that have been arbitrated or mediated? Yes. **If so, state the approximate number of these matters in which you were involved as:**

Sole Counsel: 0

Chief Counsel: 0

Associate Counsel: 10

22. List at least three but no more than five contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case: and (4) a statement of any particular significance of the case.

Matter 1 – KC Homes, LLC, et. al. vs. State of Arizona, et. al.

Dates of Proceeding: The plaintiff in this breach of contract case sued the State of Arizona in 2016 and named several employees of the Department of Economic Security, in their official capacities, and asserted constitutional, tort and contract claims. I became involved in the matter as the in-house counsel representative when I joined the Department in January 2019 and guided the matter to a dismissal with prejudice following strategy sessions and settlement discussions with the agency's outside counsel in April of 2020.

Counsel Information:

- William A. Richards, Richards and Moskowitz, Counsel for Defendants. Contact information listed in Confidential Section.
- Karen Moskowitz, Richards and Moskowitz. Counsel for Defendants. Contact information listed in Confidential Section.
- Shayna Stuart, Counsel for Defendants. Contact information listed in Confidential Section.
- John R Dacey, Gammage and Burnham, Counsel for Plaintiff. Contact information listed in the Confidential Section.
- Christpher L. Hering, Gammage and Burnham, Counsel for Plaintiff. Contact information listed in the Confidential Section.

Summary: The Department terminated the Plaintiff's qualified vendor agreement under which the Plaintiff had provided services to developmentally disabled adults following an investigation into alleged non-compliance with contractual obligations. The Plaintiff sued, essentially alleging wrongful termination, breach of contract, and interference with business expectancies.

Significance: For Arizonans with developmental disabilities, the Department's Division of Developmental Disabilities (DDD) serves as an integrated managed care organization. It subcontracts requirements for physical and behavioral health care services to health plans, but for DDD members who require long-term care

residential placement, DDD subcontracts with qualified vendors/providers who provide home and community-based group home services. DDD is contractually required to maintain an adequate network of providers and the governing statutes provide for an open and continuous qualified vendor agreement process.

Disputes regarding contract service compliance can lead to contract termination. In this case, an Interim Department Chief Procurement Officer (CPO) initially reversed the intended termination action. After the Department discovered additional health and safety concerns, it terminated the Plaintiff's contract. The Plaintiff unsuccessfully argued the preclusive effect of the CPO decision and challenged the immunity of the State defendants who acted under color of law. The Parties elected to settle the matter to avoid protracted litigation. The case is significant because it solidified the importance of governmental action to protect the health and safety of vulnerable individuals, 40,000 of whom were then served by DDD, and affirmed that state actors, acting appropriately under color of law, are immune from liability. The case operated to encourage action that protects those who cannot protect themselves and crystalized (for me especially) the importance of contract administration in an organization with the size and scope of the Department.

Matter 2 – League of Women Voters of Arizona; Mi Familia Vota Education Fund; and Promise Arizona, on behalf of themselves, their members, and all others similarly situated

Dates of Proceeding: The Department was formally notified of its alleged non-compliance with Section 7 of the National Voter Registration Act (NVRA) on behalf of the above-named entities in November 2017. The Department avoided litigation by engaging in extensive settlement discussion that I managed after I joined the Department in January 2019.

Counsel Information:

- Sarah Brannon, American Civil Liberties Union. Contact information listed in Confidential Section

- Theresa J. Lee, American Civil Liberties Union. Contact information listed in Confidential Section

- Darrell Hill, American Civil Liberties Union (ACLU) of Arizona. Contact information listed in Confidential Section

- Adam Lioz, Dēmos. Contact information listed in Confidential Section

- Arusha Gordon, Lawyers' Committee for Civil Rights Under Law. Contact information listed in Confidential Section.

- Brian Schulman, Counsel for Department of Economic Security and Arizona Health Care Cost Containment System (AHCCCS). Contact information listed

in Confidential Section

- Gina Relkin, Counsel for AHCCCS. Contact information listed in Confidential Section

- Sambo (Bo) Dul, Counsel for former Arizona Secretary of State and now Governor, Katie Hobbs. Contact information listed in Confidential Section

Summary: The NVRA requires that public assistance agencies provide persons applying for public benefits an opportunity to register to vote. Concerns about the Department's related compliance date as far back as 2007 in the State of Arizona and under threat of litigation, the Department, AHCCCS, and Arizona's Secretary of State entered into a settlement agreement that addressed the State's obligations.

Significance: The right to vote is at the heart of our democracy and burdens imposed on that right by onerous registration requirements are eased by providing individuals with additional opportunities to register. The obligation for voter registration agencies, like the Department, is to assist applicants for benefits with their voter registration when they file their initial benefit application, when they communicate a change of address, or at benefit renewal. And though these obligations are challenging to implement and monitor amidst antiquated systems, multi-service center offices and 1000-person teams, they are necessary. The Department's research revealed the need for systemic and operational improvements and settlement was key as it afforded the Department and the other involved state agencies the time needed to make those improvements. It can be difficult for non-government personnel to fully understand the depth and ramifications for changes made to severely antiquated systems. The reasoned approach to this matter allowed the agencies to mitigate against any unintended consequences that could have adversely impacted their obligations to timely process and provide benefits. Significantly, the Department's changes resulted in the Department's compliance with the law and alleviated any additional obligations that could have been necessary for that compliance but were outside the scope of the Department's expertise. At present, I am the Department's NVRA Coordinator, another meaningful role that I play.

Matter 3 – S.A. DeCorrea v. Arizona Department of Economic Security

Dates of Proceeding: The case arose from an unemployment insurance claim and subsequent administrative appeals determinations that denied pandemic unemployment assistance benefit eligibility. I became involved in the matter when the Court of Appeals accepted the request for appellate review in June 2022. I oversaw the matter until June 2024 when the parties settled the case and stipulated to a dismissal with prejudice. I served as the client contact representative (speaking exclusively with lawyers from the Office of the Attorney General) and guided the matter to resolution.

Counsel Information:

- Emily Stokes – Counsel for Appellee Department of Economic Security, Contact Information listed in the Confidential Section.

- Luci D. Davis, Osborn Maledon, Counsel for Appellant. Contact Information listed in the Confidential Section

- Rahgan Jensen, Perkins Coie, Counsel for Appellant. Contact Information listed in the Confidential Section

- Diane M. Johnsen, Perkins Coie, Counsel for Appellant. Contact Information listed in the Confidential Section

Summary: The claimant voluntarily left their job and applied for benefits claiming eligibility under pandemic emergency benefit criteria. The Department denied the claim based on its fact finding that identified the claimant failed to state a qualifying benefit reason listed in the CARES Act. The claimant appealed.

Significance: At the onset of the COVID19 pandemic, the Department was crushed with an unprecedented increase in initial unemployment applications that initially resulted in more than 300,000 (and later thousands more) applications, while at the same time fielding over 100,000 phone calls from Arizonans seeking assistance. With limited personnel the Department responded to claims under the existing and new regulatory landscape that changed dramatically and consistently from week to week and month to month. The key legislation—the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), the Continued Assistance to Unemployed Workers Act of 2020, the Consolidated Appropriations Act ("CAA"), and the American Rescue Plan Act ("ARPA") created benefit eligibility for non-traditional/independent contract workers and extended certain benefit amounts by the lost wage assistance grant program. The federal government issued approximately 100 unemployment insurance program letters ("UIPL") that further guided the State's understanding of the new legislation while simultaneously augmenting existing program eligibility with newly afforded flexibilities. Arizona, via state legislation and executive orders, supplemented these federal pandemic response activities.

Claimants who were denied eligibility challenged the Department's understanding of the legislation. Clarifications to the legislative enactments and the guiding UIPL's flowed from judicial opinions issued across the country. In Arizona, what it meant to quit a job "as a direct result of COVID19" was addressed in *Simmons v. Arizona Department of Economic Security,* 254 Ariz. 109 (App. 2022). Prior to that decision, the Department had assessed eligibility based on limited examples in federal guidance about the difference between a general fear of catching the virus and a statutorily enumerated reason. *Simmons* addressed a factual scenario that illuminated the types of employer conduct during the pandemic that the Department should consider as a "direct result of COVID19" as opposed to a general fear of catching the virus when an employee quits for the employer's failure

to effectuate virus mitigating procedures like masking, hot water hand washing and allowing others to work while exhibiting COVID19 symptoms. S.A.'s case was pending before the Court of Appeals when the Court issued its decision in *Simmons.* Unprompted, DES evaluated all appropriate matters applying the *Simmons* opinion and where appropriate reversed its determinations and issued benefits or settled claims. This was significant given the volume of pending appeals, individual attention required per case to understand the facts in each case, and the public policy mandate to promptly deliver benefits when many would argue the pandemic was over. Because the effects of the pandemic were still felt by many Arizonans, I worked incessantly to ensure benefit eligibility was addressed before the programs' then applicable sunsetting dates.

23. Have you represented clients in litigation in Federal or state trial courts?

Yes**. If so, state:**

The approximate number of cases in which you appeared before:

Federal Courts:	25
State Courts of Record:	15
Municipal/Justice Courts:	0

The approximate percentage of those cases which have been:

Civil:	100%
Criminal:	None

The approximate number of those cases in which you were:

Sole Counsel:	0
Chief Counsel:	5
Associate Counsel:	35

The approximate percentage of those cases in which:

You wrote and filed a pre-trial, trial, or post-trial motion that wholly or partially disposed of the case (for example, a motion to dismiss, a motion for summary judgment, a motion for judgment as a matter of law, or a motion for new trial) or wrote a response to such a motion:	30%
You argued a motion described above	15%

You made a contested court appearance (other than as set forth in the above response) 0%

You negotiated a settlement: 70%

The court rendered judgment after trial: 2%

A jury rendered a verdict: 5%

The number of cases you have taken to trial:

Limited jurisdiction court 0

Superior court 1

Federal district court 0

Jury 0

Note: As I noted in response to question 14, from 2014 to 2017 I worked in private practice at Baskin Richards PLC. I left Baskin Richards in August of 2017 to join the Arizona Health Care Cost Containment System and thus did not participate as counsel of record at the trial. I have noted the experience as I completed the depositions, motions and other trial preparatory work before I left the firm. Thus, I am clarifying that "I took' the matter to trial, but I did not appear as counsel of record during the trial.

24. Have you practiced in the Federal or state appellate courts?

Yes. **If so, state:**

The approximate number of your appeals which have been:

Civil: 10

Criminal: None

Other: None

The approximate number of matters in which you appeared:

As counsel of record on the brief: 8

Personally in oral argument: 3

25. Have you served as a judicial law clerk or staff attorney to a court? No.

If so, identify the court, judge, and the dates of service and describe your role.

26. List at least three but no more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts that were not negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency and the name of the judge or officer before whom the case was heard; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

Matter 1 - Community Provider of Enrichment Services, Inc. d/b/a CPES Inc, et. al; Lead Case No. 9:20-bk-10554-DS - Jointly Administered With Case No. 9:20-bk-10553-DS and Case No. 9:20-bk-10994-DS

Dates of Proceeding: April 2020 and continuing

Name of Court and Judges: United States Bankruptcy Court, Central District of California, Northern Division: Hon. Deborah Saltzman

Counsel Information:

- See Confidential Section - Exhibit 1.

Summary: This matter involved the Department's efforts to obtain relief from the automatic stay applicable to a debtor's bankruptcy and enforce the Department's authority and obligation to ensure the health and safety of over 200 vulnerable, developmentally disabled Arizona citizens residing in 50 plus group homes operated by that debtor. The Department objected to the debtor's requested relief, filed informational briefs, and argued its position, all of which resulted in a Court order that acknowledged the Department's authority, obligations and intentions. And while the Department was able to move forward and ensure the transitional care of its members, the case, as it relates to the debtor's insolvency and the implications of that insolvency for the debtor's employee owners, continues. Based on recent filings it appears the case will be resolved before the end of the year.

Significance: Arizona participates in the federal Medicaid program which allows for federal/state cost sharing for state health programs for low-income citizens. It is entitled to establish its own unique Medicaid State Plan for the delivery of health services which is approved, regulated, and enforced by the Centers for Medicare & Medicaid Services. Arizona administers its Medicaid State Plan through Arizona Health Care Cost Containment System and has established specific standards for service eligibility and methods for reimbursing service providers. One such standard is the duty to maintain a sufficient network of providers so that eligible state citizens may obtain timely and adequate Medicaid-reimbursed services

including group home services. This standard precludes Arizona from creating small groups of favored providers, and in fact encourages and requires Arizona to provide broader networks of qualified, optional providers. Arizona meets this standard for its long-term care program for individuals with developmental disabilities through the Department's Division of Developmental Disabilities Qualified Vendor Agreement program which is codified in statute. Thus, any failure to ensure compliance with federal and state law, and the contract between AHCCCS and the Department governing Medicaid reimbursable activities, puts continued State participation in Medicaid funding in jeopardy, risks discipline or sanctions against the State, and compromises the availability of residential services for an extra vulnerable population.

At the time of its Chapter 11 bankruptcy filing, the debtor, CPES, was the largest DDD contractual provider of group home services serving over 200 members across Arizona. CPES sought to enter into a stalking horse agreement, a guaranteed first bid made on its bankruptcy assets before the public auction, which would govern the sale of its asserts, and the assumption and assignment of, among other things, its contract(s) with the State. That approach failed to align with the contractual and regulatory relationship between CPES and the State, inappropriately restricted member choice, and utterly failed to consider or otherwise account for the robust qualifications, daily oversight and accountability that DDD must ensure for DDD care providers where members are at risk of serious physical and emotional harm often exacerbated by a transition from one residential placement to another. The Department therefore appeared in the case for the sole purpose of educating the Court about the Department's regulatory authority, abilities and focus on protecting and caring for disabled members. The Department has been able to use this Court's findings and order(s) favoring DDD to educate other judicial bodies in like circumstances. The matter was personally significant for me in that it affirmed the judiciary's willingness to be educated and the ongoing value in doing so.

Matter 2 - Security Alarm Financing Enterprises (SAFE), L.P. v. Fuller – No. CV2015-007680; No. 1 CA-CV 16-0255; 398 P. 3d 578 (Ariz. Ct. App. 1st Div 2017)

Dates of Proceeding: July 2017 to November 2018

Name of Court and Judges: Maricopa County Superior Court, Hon. Christopher Whitten; Court of Appeals, Division 1, Hon. Diane Johnsen, Hon. Patricia Norris, and Hon. Jennifer Campbell.

Counsel Information:

- William A. Richards, Richards and Moskowitz, Counsel for Plaintiff/Appellee. Contact information listed in the Confidential Section

- Monica A. Limon-Wynn, Limon-Wynn Law, Counsel for Defendants/Appellants. Contact information listed in the Confidential Section

- Stacy Gabriel, Gabriel and Ashworth, Counsel for Defendants/Appellants. Contact information listed in the Confidential Section

Summary: SAFE sued its former employees and their new employer — a startup full-service fire protection and electronic security monitoring company servicing Arizona — alleging torts and contract claims. Select defendants failed to assert their contractual arbitration agreements as an affirmative defense to suit when answering the complaint. SAFE refused to agree to arbitration asserting that these select defendants had waived the arbitration mandate and withstood these select defendants attempt to compel arbitration. The select defendants filed for appellate review. In a reported decision, the Court of Appeals, recognizing that it lacked statutory jurisdiction, granted special action review as there was no adequate speedy remedy from the trial court order denying their motion to compel, and ruled in Defendants' favor.

Significance: The arbitration agreement between SAFE and its former employees was a standalone agreement specifically governed by the Federal Arbitration Act. Whether Arizona or federal law governed as the applicable standard to determine waiver of a right to arbitration under the FAA would yield different substantive rights for the parties. Significantly, the case resolved that issue bringing clarity to the standard and also to what was required to meet it (i.e., knowledge of the right to arbitrate, acts inconsistent with that right, and actual rather than perceived prejudice to the opposing party from those actual inconsistent acts).

Though my legal arguments were not successful on this issue, the case affirmed to me the value of documenting significant client communications and doing so in a clear and consistent manner. Following this case and where needed, I force myself to take the time to write memos to the file rather than rely simply on my attorney notes.

Matter 3 - Arizona Association of Providers for Persons with Disabilities et. al. v. State of Arizona, et. al., CV 2009-006509; No. 1 CA-CV 09-0167; 219 P.3d 216 (2009), 223 Ariz. 6

Dates of Proceeding: February 2009 to November 2010

Name of Court and Judges: Maricopa County Superior Court, Hon. Kenneth Mangum; Court of Appeals, Division 1, Hon. Lawrence Winthrop; Hon. Diane Johnsen, and Hon. Patricia Norris.

Counsel Information:

- Juliet Peters, Framework Legal, PLLC, Attorney for Defendants/Appellants. Contact information listed in Confidential Section

- Stacy L. Shuman, State Bar of Arizona, Attorney for Defendants/Appellants. Contact information listed in Confidential Section.

- Kathleen E. Skinner, Inactive, Attorney for Defendants/Appellants. Contact information listed in Confidential Section

- John R. Dacey, Gammage and Burnham, Attorney for Plaintiffs/Appellees. Contact information listed in Confidential Section

- Ryan J. Millecam, Arizona Corporation Commission, Securities Division, Attorney for Plaintiffs/Appellees. Contact information listed in Confidential Section

- Carolyn V. Williams, Dunlap Bennett & Ludwig, Attorney for Plaintiffs/Appellees. Contact information listed in Confidential Section

- Cameron C. Artigue, Gammage and Burnham, Attorney for Plaintiffs/Appellees. Contact information listed in Confidential Section

- Jennifer L. Nye, Umass Amherst – Herter Hall 609, Attorney for Amicus Curiae, Arizona Center for Disability Law. Contact information listed in Confidential Section

- Michelle S. Michelson, Law Office of Michelle S. Michelson, PLLC, Attorney for Amicus Curiae, Arizona Center for Disability Law. Contact information listed in Confidential Section

Summary: This case arose in 2009 as a result of service suspensions and provider rate reductions implemented by the Department for members served by and through its Division of Developmental Disabilities. It began with an emergency request to temporarily restrain and preliminarily enjoin the Department from implementing the noticed actions following legislative expropriation that mandated a reduction in agency spending by approximately 100 million dollars. The trial court enjoined the State's action following an evidentiary hearing. The State appealed and in a published opinion the Court of Appeals reversed.

Significance: Legally, this case was significant because it quickly clarified the State's legislative and executive authority to manage its revenues, expenditures, and budget during an economic recession. The three judge panel noted that in the context of the federal/state funded Medicaid program, individuals are not entitled to services set out in their service planning documents without regard to the State's ability to afford the services; the process for establishing provider rates did not preclude standardized provider rate reductions during a statewide fiscal emergency; and the appropriate measure for Medicaid provider network sufficiency is whether services are available at least to the same extent that such care and services are available to the general population in that geographic area.

These standards established a critical framework for evaluating future government action.

The case was personally significant because it occurred when I was Section Chief Counsel in the Office of the Attorney General and one of the few attorneys in my area with litigation experience. The State was facing a $1.6 billion state budget deficit for the current fiscal year and my office was managing a proposed reduction in our labor force and implementing work furloughs. The lawsuit began with Plaintiffs' Friday mid-day filing of its complaint and a temporary restraining order (TRO) hearing an hour later. The TRO hearing was like a game of Wack-a-Mole as my colleague and I addressed the Court's questions based on our individual knowledge and expertise about the legal landscape of Arizona's Medicaid program, the duties of AHCCCS (the State Medicaid agency), AHCCCS' contract with the Department's Division of Developmental Disabilities and those cascading obligations, and the potential impact of the member service suspensions and provider rate cuts on the DDD Medicaid population. I was relieved when the court denied the plaintiffs' request for a TRO but dismayed when the court announced it would hold a full evidentiary hearing beginning the following Monday. I put everything else I was doing on hold – professional and personal – to prepare for that hearing and when the court issued its adverse evidentiary ruling, I recoiled at what appeared to be a lack of judicial understanding about the issues.

On appeal, the court ordered the parties to participate in a two-part hearing in the appeal. The first part was educational – the court met with counsel and asked counsel to address specific questions the court had about Medicaid funding, network management, network sufficiency identification, federal regulatory activity, provider contracting processes, and the DDD program generally. The second part was a traditional appellate oral argument in which the parties presented their opposing arguments to the court. The court's two-part approach to the appeal was highly unusual, and I remember thinking distinctly "that's new" and developing a sense of faith in the judiciary's quest for relevant knowledge to inform their decision making. The case was significant to me because I saw firsthand how important it was for advocates to present a fully developed record to a court, and the importance of the judiciary using tools within the boundaries of legitimate court procedures to make sure it has the necessary information to fairly and impartially decide complicated cases. My involvement in this case also underscored to me a basic principle of success: "Know – really know – what you are talking about."

27. If you now serve or have previously served as a mediator, arbitrator, part-time or full-time judicial officer, or quasi-judicial officer (e.g., administrative law judge, hearing officer, member of state agency tribunal, member of State Bar professionalism tribunal, member of military tribunal, etc.), give dates and details, including the courts or agencies involved, whether elected or appointed, periods of service and a thorough description of your assignments at each court or agency. Include information about the number and kinds of cases or duties you handled at each court or agency

(e.g., jury or court trials, settlement conferences, contested hearings, administrative duties, etc.).

In Arizona, a series of statutes that apply to the Arizona Heath Care Cost Containment System (AHCCCS) — A.R.S. § 41-1092.08, 36-3413, 36-2903.01— authorize the AHCCCS Director to delegate to an AHCCCS employee the Director's authority to render final decisions that are quasi-judicial orders in matters involving challenges to AHCCCS decisions filed as grievances or as initially heard by and ruled on by an Administrative Law Judge in the Office of Administrative Hearings, a separate state agency. During my tenure at AHCCCS, the Director delegated to me, as an attorney in AHCCCS' Office of Administrative and Legal Services, the responsibility to prepare and issue final agency decisions on his behalf. I no longer have access to these materials and therefore cannot state how many cases I reviewed and the number of orders I issued. My best recollection is that during my tenure at AHCCCS, from September 2017 to January 2019, I presided over approximately 15 matters. I conducted a comprehensive review of the record including all exhibits, testimony and video footage, considered the applicable federal and state laws and any interpreting rules or regulations, evaluated any procedural infirmities, determined the appropriate case outcome and issued a corresponding decision. My decisions covered cases involving the federal electronic health record incentive payment program, provider suspensions, and credible allegations of fraud committed by providers with respect to alleged services for benefit recipients.

I have served as an arbitrator in two cases under a program for compulsory arbitration, see Rule 72, Arizona Rules of Civil Procedure, and A.R.S. § 12-133. Most recently, in May 2024 the Maricopa Superior Court appointed me to serve as an arbitrator in a personal injury action, **Holder v. Steele,** filed in that court in January 2024. The case involves allegations of negligence (i.e., a breach of the standard duty of care) following a non-death injury car accident between the parties that occurred approximately two years before. As the **Arbitrator** I issued several pre-trial discovery and briefing orders and have scheduled the arbitration hearing for later in the year.

Counsel Information:

- Ty S. Dietz, Dietz Law Firm, PLLC, Attorney for Plaintiffs. Contact information listed in Confidential Section

- Waco Perry, Goldstein Woods, Attorney for Defendant. Contact information listed in Confidential Section

In March 2022, I was appointed arbitrator in **Walsh v. Hablutzel,** an action filed in Maricopa County Superior Court alleging a personal injury rooted in negligence (i.e., a breach of the standard duty of care) following a non-death injury car accident between the parties that occurred just shy of two years prior. As the **Arbitrator** I issued several pre-trial discovery and briefing orders and scheduled

the arbitration hearing for later that year. Following scheduling conflicts and good faith settlement talks, the parties settled their case.

Counsel Information:

- Bonnie Dombrowski, Jacoby and Meyers Law Offices, Attorney for Plaintiffs. Contact information listed in Confidential Section

- Beth M. Bruno, Law Offices of Rachel C. Wolf**,** Attorney for Defendant. Contact information listed in Confidential Section

28. List at least three but no more than five cases you presided over or heard as a judicial or quasi-judicial officer, mediator or arbitrator. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

See response to question 27.

29. Describe any additional professional experience you would like to bring to the Commission's attention.

Earlier this year I participated in a program that required me to reflect on my leadership journey and document my leadership point of view. In a writing that I later communicated to my colleagues, I explained that I am a leader who makes personal sacrifices. I set my work duties and priorities in ways that place the interests of the organization first. My values—honesty, loyalty and introspection—are fibers interwoven into my being that push me to be a pragmatic professional who evaluates all of the information I have available to me; past, present, good and bad. I have developed into a fierce client advocate who holds her clients, including government clients who have a fiduciary obligation to Arizonans, accountable for its actions. And while I have a "nose" for finding problems, I also make sure I am readily available to help fix them.
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BUSINESS AND FINANCIAL INFORMATION

30. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? Yes. **If so, give details, including dates.**

For a few years during high school (i.e. approximately 1986 to 1988), I worked retail sales at what was then known as the Fox Hills Mall in Culver City, CA. Interacting with babies was my passion and I loved fitting children's shoes. At least three times a week I would return home with bruises on my shins from where I had sat on the stool fitting perfectly sized Stride Rite stage 3 hard soled shoes with lace holding bells only to have a kiddo kick me.

In 2016, I co-founded Nickel Berry Works, LLC with my eldest daughter as a family owned, and operated, company focused on the publication of children's works developed by children. She authored the company's first book publication, *Dreamcatcher*; an inspirational children focused piece that delivers the message "if you work hard in every way your dreams will become a reality" at age 12. Her entrepreneurial efforts won her notable recognition. *Dreamcatcher* was sold in 12 national airports. Shortly after publication, my daughter began assisting her sister, who was just about 11, with the development and launch of a signature candle line under Nickel Berry – *A Touch of Scented Love*. The girls entrepreneurial efforts are currently on hold given their school commitments and extracurricular activities. We have maintained the entity to support their future efforts for themselves or in support of other children.

In August 2015, my husband and I created Kensington O'Reilly, a consulting firm, to produce children's programming. The firm finished its last project in 2019, and the firm has not taken on any projects or work since then.

31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise?

Yes.

If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

I am the Managing Member of Nickel Berry Works LLC., discussed in my response to question 30. As the Managing Member, I am the ultimate decision-maker

supervising its work which has been solely in support of the entrepreneurial efforts of my children. I fill the book orders and annually reconcile finances and submit for recertification as a Small, Disadvantaged, and Airport Concessionaire Disadvantaged Business Enterprise with the City of Phoenix.

I am a Member of Kensington O'Reilly, discussed in my response to question 30, and have nothing further to report.

Do you intend to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and appointed? No. **If not, explain your decision.**

The mission of Nickel Berry Works and the nominal time commitment for my activities with it are referenced in response to questions 30 and 31 above. I intend to continue supporting my children's efforts (and others upon my retirement) and thereafter hand the venture over to one or both of my daughters. My oldest is preparing to lead the company when she graduates from college; she is currently a junior majoring in Business of the Cinematic Arts at University of Southern California. She is fairly certain she will complete a novel (and perhaps her screenplay) she is working on before she graduates. She hopes to place her novel with a well-known publishing house but if that does not work out, she will likely self-publish it through Nickel Berry.

32. Have you filed your state and federal income tax returns for all years you were legally required to file them?

Yes. **If not, explain.**

33. Have you paid all state, federal and local taxes when due? With the exception of obligations from 2022, yes. **If not, explain.** I inadvertently failed to modify my federal tax withholdings during calendar year 2022. This resulted in additional federal tax liability that my family could not immediately pay as we had covered the entirety of one daughter's surgical expenses at the end of calendar year 2021, and then incurred additional unplanned family surgical expenses in June 2023. My family has now paid all taxes owed for 2022 to the Internal Revenue Service.

34. Are there currently any judgments or tax liens outstanding against you?

No. **If so, explain.**

35. Have you ever violated a court order addressing your personal conduct, such as orders of protection, or for payment of child or spousal support?

No. **If so, explain.**

36. Have you ever been a party to a lawsuit, including an administrative agency matter but excluding divorce?

Yes. **If so, identify the nature of the case, your role, the court, and the ultimate disposition.**

In **Heidi Ann Davis v. State of Arizona, et. al.,** U.S. District Court Case No. 2:19-cv-05393-SPL, a former employee of the Office of the Attorney General filed a complaint against her former leadership team, which included me as her Division Chief Counsel. She alleged claims under Title VII claiming race discrimination and retaliation, neither of which can be asserted against an individual. The complaint, filed in October 2019, was never served and the matter was subsequently dismissed for lack of service in accordance with Rule 4M in April 2020.

In **Nicole Davis et. al. v. Lowes HIW, Inc.,** Maricopa County Superior Court Case CV2008-005208, I pursued a personal injury claim following a fall in the warehouse on behalf of myself and my daughter. The matter was resolved in our favor in compulsory arbitration.

37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest?

No. **If so, explain.**

38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties?

No. **If so, explain.**

CONDUCT AND ETHICS

39. Have you ever been terminated, asked to resign, expelled, or suspended from employment or any post-secondary school or course of learning due to allegations of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity?

No.

If so, provide details.

40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation?

No.

If so, identify the nature of the offense, the court, the presiding judicial officer, and the ultimate disposition.

41. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain.

Not Applicable

42. List and describe any matter (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) in which you were accused of wrongdoing concerning your law practice.

Not Applicable

43. List and describe any litigation initiated against you based on allegations of misconduct other than any listed in your answer to question 42.

Not Applicable

44. List and describe any sanctions imposed upon you by any court.

Not Applicable

45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any

other disciplinary body in any jurisdiction?

No.

If so, in each case, state in detail the circumstances and the outcome.

46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law?

No.

If your answer is "Yes," explain in detail.

47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended, terminated or asked to resign by an employer, regulatory or investigative agency?

No.

If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) and contact information of any persons who took such action, and the background and resolution of such action.

48. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs?

No.

If so, state the date you were requested to submit to such a test, type of test requested, the name and contact information of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.

49. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings?

No.

If so, explain the circumstances of the litigation, including the background and resolution of the case, and provide the dates litigation was

commenced and concluded, and the name(s) and contact information of the parties.

PROFESSIONAL AND PUBLIC SERVICE

50. Have you published or posted any legal or non-legal books or articles? Yes. **If so, list with the citations and dates.**

Daniel C. Barr & Nicole C. Davis; *"The Door to Open Governments in Arizona," Tapping Officials' Secrets: The Door to Open Governments in the 50 States and D.C.,* Reporters Committee for Freedom of the Press, 2001

51. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge?

Yes. **If not, explain.**

52. Have you taught any courses on law or lectured at bar associations, conferences, law school forums or continuing legal education seminars?

Yes. **If so, describe.**

- ***Credible Allegations of Fraud, Notices and Conduct*, Dept of Justice, National Advocacy Center, Medicaid Integrity Institute**
  - Medicaid's program integrity standards mandate provider service suspensions if there has been a credible allegation of fraud (CAFs). CAFs must be verified by the state's Medicaid agency through claims mining, tips, demonstrable patterns in provider audits or law enforcement investigatory activity. I presented Arizona's efforts, challenges, and judicial successes to assist other states with process improvements.

- **Program Integrity in Managed Care, American Public Human Services Association (APHSA)**
  - Arizona's Medicaid program is recognized nationally as a model for managed care. Annually, APHSA convenes lawyers to discuss national standards, cases, and efforts to combat fraud, waste and abuse which diverts monies otherwise available to safeguard the health and welfare of Medicaid enrollees. I presented on AHCCCS' program integrity efforts as specifically guarded by its Office of Inspector General and Medicaid Fraud Control Unit in the Office of the Attorney General.

- ***Transition to Law Practice*, Sandra Day O'Connor College of Law, Arizona State University**
  - In this class, I discussed best practices for working with clients, including

state agencies and policy makers, and practicing law for private, public, and governmental employers.

53. List memberships and activities in professional organizations, including offices held and dates.

- Board of Directors, National Job Corps Association, *2022 – 2025*
- Member, University of Arizona James E. Rogers College of Law Board of Visitors, *2008 – present*
- Member, Site Based Council, Desert Vista High School, *2021 – 2022*
- Commissioner, City of Phoenix Planning & Zoning Commission, *2009 – 2014*
- Black Chamber of Arizona (formerly known as Greater Phoenix Black Chamber of Commerce), Director 2012 and Vice Chair 2015 – *2019*
- Member, Phoenix Mayor Greg Stanton African American Leadership Roundtable, *2013 – 2017*
- Member, Arizona State Bar Board of Governors' Program Review Committee, 2017 - *2018*
- Member, Arizona State Bar Leadership Institute Ad Hoc Selection Committee, *2007 – 2016*
- Arizona Black Bar Association, President-Elect, President, Immediate Past President, *2003 – 2006*
- Member, Maricopa County Bar Association, 2001 - 2003

Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar?

Yes

List offices held in bar associations or on bar committees. Provide information about any activities in connection with pro bono legal services (defined as services to the indigent for no fee), legal related volunteer community activities or the like.

- Participant, State Agency Forum on Access to Justice, 2023
- Member, Arizona State Bar Leadership Institute Ad Hoc Selection Committee, *2007 – 2016*

54. Describe the nature and dates of any relevant community or public service you have performed.

Jack and Jill of America, Phoenix Chapter - 2013 to Present

Jack and Jill of America is a membership organization of mothers with children ages two to 19 dedicated to nurturing future African American leaders by strengthening children through leadership development, volunteer service, charitable giving, and civic duty. I have been a member of the organization for

almost 12 years and have supported it by chairing the Legislative Committee, Audit Committee, Beautillion Fundraising Committee, Beautillion Attire Committee, Bylaws Committee, Living History Committee and event, and served briefly as a Teen Advisor. I have attended local and regional conferences and organized youth and teen holiday giving events.

Phoenix Girls Chorus (PGC) – 2013 to 2020

PGC is a non-profit organization that seeks to cultivate, inspire, and empower young women to find their voice through world-class music education and performance. The Chorus consists of two lower, one intermediate, and two advanced choirs with girls from ages seven to 18. In addition to choral music, the Chorus focuses on leadership and community service. I volunteered with the Chorus for six consecutive years serving two years as lead tour chaperone in each of the senior choirs of Bella and Cantabile, managed ticket sales for concerts across the Phoenix Metropolitan area and toured as a general chaperone with three of the five choirs regionally and nationally. As part of my commitment to the Chorus and my local community, I supported the girls as they engaged in community service activities with Feed My Starving Children, Project Cure, Arizona Veterans Home and Phoenix Children's Hospital. I raised funds directly in excess of approximately $10,000 to support scholarships and touring efforts.

55. List any relevant professional or civic honors, prizes, awards or other forms of recognition you have received.

- Leadership in Action, COVID19 and Beyond, 2022 – Arizona Department of Economic Security
- Outstanding Legal Team, CHILDS, *2013* – Office of the Arizona Attorney General
- Outstanding Legal Team, AAPPD I, *2010* - Office of the Arizona Attorney General
- Government Advocate of the Year, National Association of Women Business Owners, Phoenix, *2006*
- Nominee, Judge Learned Hand Emerging Leadership Award, *2004*

56. List any elected or appointed public offices you have held and/or for which you have been a candidate, and the dates.

- Arizona State Planning Commission, *2003 - 2006*
- Gubernatorial Appointee, Help America Vote Act 2002

Have you ever been removed or resigned from office before your term expired?

No.

If so, explain.

Have you voted in all general elections held during the last 10 years?

See response to question 7.

If not, explain.

57. Describe any interests outside the practice of law that you would like to bring to the Commission's attention.

My mother introduced me to international travel in my mid-teens and I have loved it ever since. I relish every opportunity to acquire a deep appreciation of different cultural outlooks and delight in evaluating the moral and philosophical questions about those customs and lifestyles raised by those that I encounter. Before my mother passed in 2011, I promised her that I would ensure that her granddaughters saw the world. Thus, before COVID19, our immediate family traveled internationally, nationally and regionally every year.

My youngest daughter introduced my husband and me to Formula 1 racing in the Spring of 2023 and I've been a fan ever since. We traveled to the sport's inaugural return to Las Vegas later that year and were amazed at the energy just being in the city generated for us. We'd like to attend a sprint race weekend in Mexico City and/or Italy in the coming years.

HEALTH

58. Are you physically and mentally able to perform the essential duties of a judge with or without a reasonable accommodation in the court for which you are applying?

Yes.

ADDITIONAL INFORMATION

59. The Arizona Constitution requires the Commission to consider the diversity of the state's population in making its nominations. Provide any information about yourself (your heritage, background, life experiences, etc.) that may be relevant to this consideration.

Like most of us, I am more intricate than my initial appearance might suggest. Initially, you quickly learn that I am a well-educated African American woman who has dedicated the vast majority of her professional career to public service. I'm a daughter, a sister, a wife, a mother, a stepmother, an aunt, and a friend. I am deeply devoted to family, biological **and** created, and revel in direct communication, given and received. And, just like so many deeply engaged working people, from time to time, I become unintentionally distant when work is particularly busy. To decompress the stress, I binge watch Netflix with my youngest daughter and attend comedy shows with my husband.

What few people know is that I was raised by a mother who was the 10th child in a close-knit family of less than sufficient economic means who walked to school in bitter winters wearing her older sister's clothes and with shoes whose soles were often taped together and stuffed with newspaper for warmth and support. And what very few people know is that my father was sent across the country to live with his brother at the tender age 17 to literally save his life. And what even fewer people know is that I was despondent and uncommunicative for weeks as a teen when within an 18-month period I lost my aunt to breast cancer, her son to a heart condition, and his brother while in police custody occupying a jail cell alone.

I don't share these things now to seek sympathy or to pull on the heart strings. I share them to frame the color and composition of who I am. I was born of struggle yet infused with fight. I learned to be resilient and have persevered and that won't change. I am not shy because I cannot afford to be. Education has provided me a path toward economic stability, despite cultural disparities, and I am better for it.

I've made Arizona my home, and Arizona and its people have been good to me. And like all things I care for and about, I feel a responsibility to Arizona and its people. I'm prepared to do the hard work for us all to be better.

60. Provide any additional information relative to your qualifications you would like to bring to the Commission's attention.

Not Applicable.

61. If selected for this position, do you intend to serve a full term and would you accept rotation to benches outside your areas of practice or interest and accept assignment to any court location?

Yes**. If not, explain.**

62. Attach a brief statement explaining why you are seeking this position.

See Attachment A.

63. Attach two professional writing samples, which you personally drafted (e.g., brief or motion). Each writing sample should be no more than five pages in length, double-spaced. You may excerpt a portion of a larger document to provide the writing samples. Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

See Attachments B and C.

64. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than three written orders, findings or opinions (whether reported or not) which you personally drafted. Each writing sample should be no more than ten pages in length, double-spaced. You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

See Attachment D. Further, as stated in response to question 27, I was appointed as an arbitrator on two prior occasions. In those roles I issued standard pre-trial discovery and briefing orders. Given their routine nature, I've elected to not attach them here but can provide them upon request.

65. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last three performance reviews.

Not Applicable.

Attachment A
Statement of Interest

My legal aspirations today are quite different from when I first entered law school. Like a young adult coming of age, my goals, dreams, and ambitions have evolved over decades of both private and public practice. I cannot say that becoming a justice was a lifelong dream held from childhood, but rather a calling that developed through my work in the law and in government, where I've seen firsthand how sound legal judgment and thoughtful statutory interpretation can profoundly impact the lives of Arizonans. The bulk of my career has been dedicated to applying the law to protect and improve public services, finding consensus among competing interests, and solving complex legal and policy issues in ways that benefit the public.

My professional journey, through apt analogy, can be compared to my changing seat in the family car when I was growing up. In childhood, I rode in the back seat, with varying degrees of patience, relying on my parents to chart our direction and guide the way. In my early legal career, partners at my firm similarly acted as guides and mentors, showing me those practicalities of law that could not be taught in school. Although I was entrusted with substantial legal work — researching, drafting pleadings and client memoranda, leading discovery — I operated in the back seat – in the background while senior partners developed the strategic direction of our cases and managed client engagement. In many ways, my work then was a reflection of the guidance and instructions that I received.

That early stage of my career was crucial to my development. It allowed me to hone my legal skills, sharpen my intuition, and grow into a practitioner capable of evaluating legal positions with a critical eye. Over time, as I took on greater responsibility, I moved from the back seat into the driver's seat, leading cases, developing strategy, advising clients, and making the judgment calls that would define outcomes. It was this steady accumulation of experience that has given me the confidence and skill to lead with clarity and precision.

For years now, I've been behind the wheel, guiding government decision-making, particularly within health and human service agencies, in ways that balance the needs of the public with the requirements of the law and a focus on improving people's lives and agencies' outcomes. This has involved navigating complex legal landscapes, often in contested environments, managing state and federal mandates, always with an eye toward financial constraints, implementing judicial decisions, and developing policies that directly affect Arizonans. My work has always been driven by a commitment to fairness, equity, and ensuring that services are accessible to those in need. This experience has deepened my understanding of the judiciary's vital role in maintaining public trust as it articulates common law and clarifies the legal landscape.

For this judicial position, I bring with me not only a broad and deep wealth of legal knowledge but a commitment to fairness and transparency. I believe that justice should be administered in a way that is clear, understandable, and accessible to the public. While

legal expertise is an obvious prerequisite for any justice, and my decades of experience serving private clients and overseeing and steering the legal policies of numerous Arizona agencies demonstrates I have that expertise, I also bring with me the bedrock skills that are essential to and define true leadership—social intelligence, resilience, integrity, a capacity for introspection, and the ability to communicate and listen effectively. These qualities, honed over years of serving both private clients and Arizona state agencies, enable me to lead with empathy and practical wisdom.

Ultimately, my desire to serve as a justice is a natural continuation of the work I have done throughout my career: improving lives through thoughtful legal analysis, bridging opposing views, and reinforcing the ideals of fairness, reason and impartiality. I seek this appointment not as the culmination of a lifelong dream, but as the next step in my ongoing commitment to ensuring that the law serves the people it was designed to protect.

Attachment B
Writing Sample 1

Excerpt Explanation

In this commercial contract matter, the Plaintiff elected to litigate the parties' dispute in court. The Defendants, notwithstanding a contractual arbitration provision, failed to assert their right to arbitrate prior to or as part of their answer to the complaint. The issue before the court was whether the Defendants abandoned (i.e., legally waived) that right.

For anonymity, the parties' names have been replaced with "Plaintiff" and "Defendant." For brevity, Exhibit references have been replaced with "REDACTED, parallel reporter citations deleted, and string citations replaced by "OMITTED."

THE ISSUES HERE HAVE BEEN FORMALLY DISPUTED SINCE AS EARLY AS APRIL, 2015, AND THE MOVING DEFENDANTS ELECTED NOT TO PURSUE THE DISPUTE IN ARBITRATION

If that were not enough, Plaintiff, through its counsel, made demands on the Defendants as early as April 2015 related to their obligations to Plaintiff as its former employees, and Defendants responded through counsel three (3) days later. [REDACTED]. There were multiple formal exchanges of correspondence between counsel over the course of two months about this dispute. [REDACTED]. Thus, even if the Arizona law was different and the Moving Defendants were allowed to claim somehow that they had "forgotten" about the arbitration clause, their involvement in an ongoing, formal dispute over the Defendants' post-employment obligations in which all sides retained counsel assures the Court that the Moving Defendants and their attorneys had reason for 6 months before the instant Motion was filed to inquire about what employment-related agreements they had signed. There is no doubt that the Moving Defendants were aware of the arbitration terms they now try to invoke.

Throughout the ongoing, formal dispute, the Moving Defendants could have elected to try and move the disagreement to arbitration and seek a declaration that they were entitled to use Plaintiff's business information or solicit its clients. [REDACTED]. They did not – and given their legally assumed knowledge that such options existed, their decision is undeniably inconsistent with enforcing a right to arbitrate and must be considered an intentional waiver of that option. *See Burton-Dixie Corp. v. Timothy McCarthy Const. Co.* 436 F.2d 405, 408-409 (5th Cir 1971) (concluding there had been a waiver to any right to insist upon arbitration where "at no time before answering the complaint in the instant lawsuit … [was there a] demand that the matter be submitted"

and “in its answer to the complaint, [they did not] “ask the court to stay proceedings pending arbitration, but rather denied liability…”); *Bd. of Educ. Taos Mun. Schs. v. Architects*, 709 P.2d 184 (N.M. 1985) (finding waiver of right to arbitration where party failed to make a simple demand for arbitration or include the right as an affirmative defense in the answer to the complaint).

Having received no compliance with its demands, Plaintiff was forced to seek formal relief. Two of the Defendants in this action – Defendants - have no written agreement with Plaintiff containing any arbitration language. To assure an economy of resources for all parties, and to avoid the possibility of inconsistent adjudications, Plaintiff elected to file suit against all Defendants. Had the Moving Defendants elected to invoke their claimed arbitration rights, Plaintiff would have faced different considerations, and could have structured its litigation pursuits differently. Plaintiff’s complaint was filed June 25, 2015, and Plaintiff provided the Moving Defendants’ original attorney a courtesy copy of that complaint within days thereafter. The Defendants accepted service on July 7, 2015, and after requesting and receiving several extensions to file a responsive pleading, the Moving Defendants answered on August 24, 2015. At no time did the Moving Defendants mention arbitration, request arbitration, or even preserve a claim to arbitration rights in their Answer. They waived that issue. *See Cortez*, 226 Ariz. at 211; *Cordillera Corp. v. Heard*, 592 P.2d 12 (Colo. Ct. App. 1978) (noting that plaintiff’s filing of a complaint constituted an offer to waive an arbitration clause which was accepted when defendant answered without demanding arbitration; having accepted plaintiff’s offer the contract provisions were waived).

On August 29th, the Moving Defendants asked Plaintiff to stipulate to an extension

for Rule 26.1 disclosures. Plaintiff granted the Defendants that extension. [REDACTED]. Two weeks after the Moving Defendants stated they would provide their 26.1 disclosures, and approximately a month after the Defendants answered, the Moving Defendants sought an agreement to arbitration. They also requested a further extension of time to serve their Rule 26.1 disclosures. Plaintiff again provided that extension. [REDACTED"]. Plaintiff reviewed the Moving Defendants' arbitration request and informed Moving Defendants' counsel that they had waived any right to arbitrate, providing the *Cortez* decision. The Moving Defendants did not respond to the substance of Plaintiff's contention but rather stated their intention to immediately file the current Motion and threatened to seek attorney fees. The Moving Defendants then (for a third time) sought an extension to provide their Rule 26.1 disclosures. Plaintiff did not grant that extension and pursuant to the parties' prior agreement provided its Rule 26.1 disclosures to all Defendants on November 5, 2015 [REDACTED] and supplemented that statement on November 13, 2015 [REDACTED].

Somehow the Moving Defendants argue that this timeline is evidence that they had "no knowledge of an existing right to arbitrate." That claim of ignorance is rejected as a matter of law by *Cortez* and *In re Estate of Henry, supra*, because the Moving Defendants undisputedly signed the documents they seek to enforce long before the litigation commenced and are presumed to know what they signed. Also, it is clear from the Motion that the Moving Defendants had copies of the arbitration forms all along. With a bare minimum of reasonable care and diligence either of the Moving Defendants' current or original counsel, responding to allegations arising out of their clients' prior employment, should have sought from their clients all documentation they had signed in

connection with their employment. Having failed to do so, the Moving Defendants waived any right to arbitrate.

THE DEFENDANTS HAVE WAIVED AND REPUDIATED ARBITRATION

The Moving Defendants' failure to demand arbitration in their Answer is an act inconsistent with arbitration and constitutes a waiver of the arbitration terms as a matter of law. State courts may disregard arbitration terms "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Such grounds include "general contract defenses such as fraud, duress, or unconscionability, grounded in state contract law, [that] may operate to invalidate arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002) (OMITTED)); *see also Cooper v. QC Fin. Servs.*, 503 F. Supp. 2d 1266 (D. Ariz. 2006) (OMITTED); *Coup v. Scottsdale Plaza Resort, LLC*, 823 F. Supp. 2d 931 (D. Ariz. 2011) (same).

In Arizona, filing an answer without raising a contractual defense acts as a general waiver and repudiation of a contractual provision that might otherwise be enforced. In *Cortez,* the defendants filed an answer without demanding arbitration and continued to litigate in the trial court. The *Cortez* court held that the defendants had waived their right to arbitrate. In *Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576 (1994), the defendant insurer removed the action to federal court and filed an answer, and then ten days later filed a motion to compel the trial court to stay the action pursuant to an insurance appraisal provision. The *Meineke* Court held that under those circumstances, the insurer repudiated the appraisal clause. *Id.* at 582. ("In our view, a party's filing of a lawsuit without invoking arbitration or appraisal would nearly always indicate a clear repudiation of the right to arbitrate or have an appraisal, ***and the filing of an answer normally has the same***

effect.") (emphasis added).

In *Bolo Corp. v. Homes & Son Constr. Co.*, 105 Ariz. 343, the Arizona Supreme Court affirmed that the plaintiff had waived its right to arbitrate, citing the Seventh Circuit for the rule that "Commencement of suit in a court rather than reliance upon arbitration, ***with answer by the opposing party upon the merits, is a waiver of the right to arbitrate by both parties***." (citing OMITTED) (emphasis added).

The Moving Defendants have tried to suggest that the foregoing rule is somehow an arbitration-specific rule that fails under the FAA standards. First, this illogically presumes that the Arizona Court of Appeals, deciding the issue in 2010, somehow adopted a state waiver standard that would violate requirements of the FAA. Recalling that the FAA was enacted some 85 years earlier with subsequent codifications, amendments and updates, and that the FAA precedent the Moving Defendants rely on was decided in the 80's, 90's and early 2000's, years before *Cortez,* it is hardly logical to assume that *Cortez* does not comport with the FAA.

Instead, once the Court recognizes the rule in *Cortez* for the general waiver rule it reflects under Arizona law, it is entirely enforceable under Section 2 of the FAA, which respects fully those general waiver rules established "at law or in equity" by the states. *See* 9 U.S.C. § 2. The Arizona precedent makes clear that the waiver standard is a general contract enforcement standard. Other Arizona cases show similar waivers enforced for other, non-arbitration contract terms. *See State ex. Rel Horne v. Campos*, 226 Ariz. 424 (App. 2011) (noting the general principle that any litigant can waive a right to object to an adverse party's failure to comply with constitutional, statutory, contractual or procedural requirements and finding State of Arizona waived objection to failure to

timely file claim). The FAA and federal precedent is also clear – when a state like Arizona has created a general rule of contract waiver, application of that rule does not offend the FAA and the FAA does not impact the rule. *See, e.g., Cox v Ocean View Hotel Corp.*, 533 3d 1114, 1121 (9th Cir. 2008) ("Under the FAA, a party may challenge the validity or applicability of the arbitration provision by raising the same defenses available to a party seeking to avoid the enforcement of any contract. These contract based-challenges are governed by applicable state law.") (internal cites omitted).

Attachment C
Writing Sample 2

Excerpt Explanation

This excerpt is from a defamation case where the Defendant is alleged to have circulated emails that impeached the honesty, integrity and reputation of the Plaintiff. The issue was whether the Defendant had a pattern of defaming others through spurious attacks on others character, race, and ethics that would undermine the current defense. In the course of the litigation, the Defendant's emails were discussed. The Plaintiff subsequently requested production of the emails under the rules of civil procedure but the Defendant refused to comply or authorize the email carrier to do so. Plaintiff filed a motion to compel the Defendant's agreement to the carrier's production of the communications.

For anonymity, the parties' names have been replaced with "Plaintiff" and "Defendant" and the name of the communication carrier replaced with "the carrier."

The Stored Communications Act does not Shield Defendants From a Court Order Compelling Consent to the Production of Communications to Ensure Defendants Compliance with Rule 26.1's Mandatory Disclosure Obligations

Every Arizona litigator should know that Rule 26.1 was intended to eliminate hostile and unprofessional conduct in favor of the voluntary cooperation and exchange of information to enable parties and their counsel a reasonable opportunity to prepare for trial or settlement. Nothing more and nothing less. *See Bryan v. Riddel,* 178 Ariz. 472 (1994). When followed in good faith, the wearisome effort and cost associated with creating and answering discovery is eliminated and the utilization of narrowly tailored discovery devices allows the parties to truly flesh out the issues. Courts are therefore encouraged "to take firm, active roles in the application and enforcement of these procedural rules that were specifically designed to curb discovery abuse, excessive cost and delay." *Allstate v. O'Toole,* 182 Ariz. 284 (1995). In this case, Defendants have failed and/or refused to comply with Rule 26.1's mandatory disclosure obligations. They have also elected to not demonstrate any effort to secure the discovery materials that now are well past the final supplemental disclosure date of August 12, 2016, and are on the eve of the close of discovery, set for September 19, 2016, still not disclosed. It appears that they choose instead to inappropriately rely on the carrier's refusal to produce Defendant's communications.

Under the Stored Communications Act, 18 U.S.C. § 2701 *et. seq*., an electronic communication service is prohibited from divulging the contents of a communication while in electronic storage by that service. Similarly, a provider of remote computing service may generally not knowingly divulge the contents of communications carried or maintained on that service. A provider is excused from these prohibitions, however, when

a user gives "lawful consent" to disclosure. *See* 18 U.S.C. § 2702 (b)(3). Consent is effective as to communications when given by "the originator or an addressee or intended recipient of such communication." *Id.* And while consent generally contemplates a users' voluntary agreement, case law guides that court ordered consent is effective in satisfying the Stored Communications Act lawful consent requirement. *See e.g. O'Grady v. Superior Court,* 139 Cal. App. 4th 1423, 1466 (2006) (implicitly finding that court ordered consent is and will be effective to satisfy the stored communications act lawful consent requirement); *see also Romano v. Steelcase,* 30 Misc., 3d 426 (2010) (resolving in favor of defendants a discovery dispute about compelled access to Facebook and MySpace pages, accounts and records including those records that may have been previously deleted or archived by said operators where information had been made public thus mitigating against any reasonable expectation of privacy; and directing plaintiff to deliver to counsel for defendant a properly executed consent and authorization in a form as required by the operators of Facebook and MySpace); *Nuaman Abdulla Ahmed Al Naoimi v. Zaid,* 2012 U.S. Dist. LEXIS 144061 (requiring the execution of a consent for the release of communications from two email accounts noting the court's authority to do so under discovery rules thus negating any requirement that it resolve potential violations of disclosure under an electronic communications privacy act). Thus, where a party refuses to agree to the production of materials, courts can and have compelled consent as a prerequisite to production. *See, e.g. Miranda v. 21st Century Ins. Co.* 117 Cal. App. 4th 913 (2004) (affirming judgement of dismissal after claimant refused to comply with discovery order to sign an authorization for release of records); *Negro v. Superior Court,* 230 Cal. App. 4th 879 (2014) (concluding that no sound basis exists for any reasoning

that the stored communications act "empowers service providers to defy civil subpoenas seeking discovery of materials that are excepted from the Act's prohibitions on disclosure. Insofar as the Act permits a given disclosure, it permits a court to compel that disclosure under state law"). Since the Defendants have failed to comply with Rule 26.1's mandatory disclosure obligations and refuse to consent to the production of communications from the carrier, Plaintiffs request this Court exercise its authority to issue an order compelling Defendants to consent to the production of communications from the carrier in compliance with the subpoena duces tecum properly issued.

Defendants' Continuing Failure to Comply With Their Disclosure Obligations is Also a Violation Under Rule 37(d), Arizona Rules of Civil Procedure

Defendants purposeful and inexcusable neglect in producing relevant and responsive email communications despite their mandatory disclosure obligations as well as Plaintiffs' Discovery Requests leads to the compelling inference that Defendants are failing to disclose "unfavorable information." Rule 37(d) provides:

> A party's or attorney's knowing ***failure to timely disclose damaging or unfavorable information shall be grounds for imposition of serious sanctions*** in the court's discretion up to and including dismissal of the claim or defense.

Id. (***emphasis added***).

In this case, Defendants' pattern of first failing to protect information in accordance with Plaintiffs' demand that they preserve documents, tangible things and electronically stored information for later production, coupled with the selection of self-serving and inappropriately restricted emails, followed by their repeated baseless but strenuous objection to the disclosure of Defendant's email communications from the carrier,

mandates that the Court sanction Defendants in accordance with Rule 37(d). Plaintiffs request this sanction include an award of attorneys' fees for the cost and expense incurred in traveling to New York City to take the deposition of Defendant where Plaintiffs' exploration into relevant issues was inappropriately limited and obstructed by Defendant and her counsel, preparing and serving the subpoena duces tecum on the carrier, and in bringing this motion, together with additional monetary sanctions. Plaintiffs further request that in the event Defendants fail to consent to the production of Defendant's emails within three days of the Court's decision on this motion, that the Court enter as a sanction under Rule 37(d) a finding that excludes Defendant's testimony for failure to provide a proper response during her deposition and further allows Plaintiffs to present evidence of all other false and defamatory communications obtained in this matter demonstrating Defendant's reckless disregard for a statement(s) truth without affording Defendant an opportunity to respond in contravention thereof. This sanction is appropriate given Defendant's actions at Defendant's deposition and for Defendants' failure to timely disclose documents that are relevant and likely to lead to the discovery of admissible evidence.

Attachment D
Quasi-Judicial Order/Decision

Excerpt Explanation

As stated in response to question 27, statutes governing Arizona's State Medicaid agency authorize the AHCCCS Director to delegate their authority to render final decisions that are quasi-judicial orders in grievance matters involving AHCCCS decisions. This excerpt is from a 27-page Decision that relates to AHCCCS' implementation of the federal Electronic Health Record Incentive Payment Program and an overpayment of incentive monies paid to one of its hospital providers. The Decision identifies, incorporates, and relies upon, the federal and state governing provisions, Arizona's federally approved implementation of the program, and parts of the program that specifically applied to the types of services provided by, and the level of certification of, the hospital. The legal complexity of this matter cannot be overstated and is akin to a teenager navigating Medicare Parts A and B for their elderly parents.

The specific issues addressed in the excerpt are the general application of a billing reference code to identify neonatal intensive care vs. low-level nursery services as combined with a hospital acuity certification and that impact on the incentive payment calculation. Second, is the inability of AHCCCS to agree with a separate proposed course of action.

For anonymity, the hospital system has been replaced with "Appellant," all monetary amounts stricken and replaced by "$0.00", and NICU day references replaced by "XXXX".

Discussion

Through its grievance letter and subsequent meeting with AHCCCS, APPELLANT requests that AHCCCS set aside the overpayment amount identified in the Notice and replace it with the HHS OIG overpayment determination of $0.00. APPELLANT supports its request by positing that AHCCCS and its consultant, Myers and Stauffer, for purposes of calculating EHR incentive program payments improperly applied, and acted inconsistent with the intent of, federal regulations and the AHCCCS Reference Guide by defining NICU as identified by only revenue code 174. APPELLANT contends that AHCCCS' definition of NICU results in an underrepresentation of APPELLANT'S allowable acute care discharges and Medicaid inpatient bed days thus constituting an overstated EHR incentive overpayment that will unjustly enrich AHCCCS. APPELLANT further contends that all EHR incentive payment calculations must rely on data elements derived from the Medicare Cost Report without review. Each of these issues is addressed below and for the reasons identified which rely on and incorporate the applicable governing federal and state statutes, rules, guidance and program documents detailed in this Notice of Decision, the administration is not persuaded by APPELLANT'S rationale.

A. AHCCCS Implemented the Medicaid EHR Incentive Payment Program consistent with Federal and State Statutes, Rules and Guidance, with each Governing EHR Program Document approved by HHS/CMS.

As Arizona's single state Medicaid Agency, AHCCCS, has the delegated authority to administer the Medicaid program in the State of Arizona [See, Arizona State Plan, Section 1.1 at pg. 2] and has done so for over 30 years. This necessarily includes the Medicaid EHR Incentive Payment Program enacted through ARRA and the HITECH ACT in 2009 once AHCCCS was appropriately identified. Before the inception of the EHR

program, however, AHCCCS, through its public rule-making function in 1998, re-established agency rules identifying AHCCCS' treatment of low-level nursery and NICU services rendered inpatient at acute care hospitals. See, 11 A.A.R. Issue 35. AHCCCS provided that for a claim to be reimbursed at the NICU tier, a hospital had to be certified as a Level II or Level III NICU and the claim submitted must have met the requisite medical criteria for the NICU tier **and** must have a revenue code of 174; otherwise the claim would only qualify for a low-level nursery tier payment. See, A.A.C. R9-22-712.01. AHCCCS utilized this NICU and low-level nursery tiered rate system until September 30, 2014. See, A.A.C. R9-22-712.01.

AHCCCS also set forth its utilization of the tier rate system in the Arizona State Plan. Therein, AHCCCS clearly stated, for the relevant time period, that NICU shall be identified by revenue code 174 and all other nursery services by revenue codes 170-173. See, Ex. 16, Excerpt of Arizona State Plan, Methods and Standards for Establishing Payment Rates Inpatient Hospital Care, Attachment 4.19-A at pgs. 4-5. Importantly, AHCCCS' actions in identifying a two-tiered rate system were consistent with CMS guidance for identifying and processing claims for related newborn services. See, Ex. 17, July 10, 2009, CMS Manual System, Pub 100-04 Medicare Claims Processing, Transmittal 1767. It was with this framework that AHCCCS implemented the Arizona Medicaid EHR Incentive Payment Program in alignment with its preceding characterization and treatment of NICU and low-level nursery services.

As the Arizona EHR program administrator, AHCCCS receives federal financial participation to fully fund the incentive payments as well as costs for conducting administrator required activities like program implementation, outreach and oversight.

See, HITECH ACT § 1903(a)(3)(F). To receive its implementation funding, AHCCCS developed, submitted, and maintained a SMHP and a HIT IAPD. See, Social Security Act, §1903(t)(9); 42 C.F.R. Subchapter IV, Part 495 generally; 42 C.F.R. §§ 495.316, 318; and Final Rule at 44507 – 44516. AHCCCS developed the required materials and in accordance with federal requirements obtained HHS/CMS approval. See, Social Security Act §1903(t)(6(C)(i)(II); 42 C.F.R. §495.324; Final Rule at 44324; SMD Letter on September 1, 2009 [Ex. 1]; Exs. 4-14. Notably, within the SMHP Version 2.0 AHCCCS identified the agency's policy of excluding newborn services not classified as NICU. See, Ex. 6 at pgs. 111, 122, 125, 205 and 206. Subsequent SMHP versions contained like or sufficiently similar language regarding APPELLANT'S adherence to potential pre- and post-incentive payment audits; the agency's intention to seek any additional documentation necessary to validate provider submissions supporting incentive payment calculations, including but not limited to auditable reports/data sources and attestation requirements; and the agency's policy when calculating discharges and inpatient bed days for services. See, Exs. 7-14. And, despite having reviewed yearly SMHP submissions by AHCCCS, HHS/CMS never objected to AHCCCS' identification and treatment of NICU and low-level nursery paid days and discharges through the use of revenue code 174 and revenue codes 170-173, respectively.

It is undisputable that AHCCCS identified its treatment and classification of NICU covered services as requiring the distinct use of revenue code 174. For the period representing the fiscal year data used to calculate EHR incentive payments, it was explicitly set forth in the Arizona Administrative Code as well as the Arizona State Plan. The SMHP and the Reference Guide sufficiently reference the inclusion of NICU and

neither document deviates from the agencies preexisting construction of that term. More, this writer has not located any provisions in the Final Rule that restrict States from constructing their own definitions of NICU and low-level nursery services, especially where those terms have been previously defined. It follows that where the federal government afforded states flexibility to administer their Medicaid EHR program, AHCCCS' treatment of NICU and low-level nursery through revenue code definitions is not beyond the scope of the Medicaid EHR Incentive Payment Program guidance, statutes or rules. And, while APPELLANT'S grievance intimates that CMS' approvals of subsequent SMHP and Audit Strategy submissions constitute AHCCCS' use of a retroactive payment methodology, that position is simply misplaced. AHCCCS' utilization of revenue code 174 to identify payable NICU services was a well-established Medicaid rule in the State of Arizona. And, in fact, APPELLANT adhered to this rule. For its EHR incentive payment program base year (i.e., XXXX), APPELLANT was accorded XXXX NICU discharges and XXXX NICU days as its billings indicated the NICU tier and revenue code 174. Notably, of the XXXX NICU days, XXXX days were indicated as paid by Medicaid in the hospital's documentation.

B. APPELLANT'S billing errors necessarily result in the exclusion of APPELLANT'S low level nursery claims in accordance with the Regulatory Framework Governing the Medicaid EHR Incentive Payment Program.

In its grievance and during its meeting with AHCCCS representatives, APPELLANT acknowledged that for reasons wholly unrelated to AHCCCS or the Medicaid EHR Incentive Payment Program, APPELLANT failed to properly identify on claims submitted to AHCCCS all acute care covered services that were subject to payment reimbursement under the NICU tier had they included revenue code 174.

Accordingly, APPELLANT wants AHCCCS to recognize and credit APPELLANT in its EHR calculations for Medicaid days and discharges for APPELLANT'S current identification of almost decade old acute care covered services rendered to newborns, where the claims were submitted to AHCCCS with the low-level nursery identifiers of revenue codes 172 and 173, and paid by AHCCCS in accordance therewith. Such a concession is prohibited.

Both the federal statute and the Final Rule governing the Medicaid EHR Incentive Payment program prohibit States from accounting for anything other than paid acute inpatient bed days in the calculation of the Medicaid portion of the Medicaid Share formula for a hospital's EHR incentive payment. See, Final Rule at 44498, 44500. During the relevant time period, AHCCCS required the use of revenue code 174 to identify claims that qualify for NICU reimbursement. See, A.A.C. R9-22-712.01, R9-22-712.09; Ex. 16, Excerpt of Arizona State Plan. Low-level nursery days (claims with revenue codes 170-173) are specifically excluded from any inclusion in the Medicaid Share formula for EHR incentive payments. See, Ex. 6, SMHP Version 2.0 at 125; Ex. 18, HHS OIG Report; Ex. 19, Audit Strategy; Final Rule at 44450-53; Ex. 15, Reference Guide.

More, CMS representatives have identified that use of level II nursery services identified by revenue code 172 are not included in the Medicaid EHR calculation, and therefore, nursery revenue codes representing lower acuity than 172 (i.e., 170-171) would also be excluded. See, Ex. 23, November 10, 2014 Email from XXXX. In light of the mandate to only include paid Medicaid days, coupled with the exclusion of low-level nursery, and in consideration of AHCCCS' identification of revenue codes 172 and 173 as low-level nursery, AHCCCS cannot accord APPELLANT inclusion of Medicaid days

identified by revenue codes 172 and 173 in the Medicaid Share. AHCCCS did not pay (i.e., reimburse) the days and discharges APPELLANT has now put in question as acute care services. More, any suggestion that APPELLANT is harmed by this approach is mitigated. The Medicaid EHR Incentive Payment Program is completely voluntary. Non participation would not have resulted in any penalty associated with Medicaid payments, and more, the program is specifically structured to incentivize participation. The incentive payments are not tied to any level of service nor are they a reimbursement for any programmatic costs incurred. See, Final Rule at 44482.

C. AHCCCS' Detailed Review of Hospital Data Supporting the Medicare Cost Report is both Necessary and Mandated, and APPELLANT'S Acknowledgement of the Fallacies in the HHS OIG Audit Evidences AHCCCS' Obligation to Not Simply Rely on HHS OIG's Audit Methodology or Findings.

APPELLANT suggests that AHCCCS should simply rely on the information that APPELLANT reported on its Medicare Cost Report to support the Medicaid Share formula calculation of APPELLANT'S EHR incentive payment. APPELLANT adds that to the extent HHS OIG determined an overpayment related thereto, AHCCCS should simply accept HHS OIG's findings. APPELLANT supports its position by positing that the only appropriate data source articulated by the federal government and subsequently AHCCCS is the Medicare Cost Report. APPELLANT is incorrect.

As the Medicaid EHR Incentive Payment Program administrator, AHCCCS is mandated to conduct a variety of functions. Some functions include validating hospital attestations and supporting activities associated with the incentive payments as well as conducting post-payment audits. See, Social Security Act, § 1903(t)(9); 42 C.F.R. Subchapter IV, Part 495 generally; 42 C.F.R. §§ 495.316, 318; and Final Rule at 44507

– 44516. AHCCCS identified to all EHR program participants its duties to validate attestations and to conduct the required audits. See, Exs. 6-14. The audit authority requires AHCCCS to review the data supporting provider attestations, and indeed subjects all such documentation to review. See, Final Rule at 44515-6. AHCCCS is allowed to use a variety of data sources in conducting its audit including but not limited to, the Medicare Cost Report, hospital financial records, patient accounting reports, data warehouse reports and the like. See, Final Rule at 44501, 44515-6. And, while the Medicare Cost Report is an allowed data source, HHS/CMS has recognized that the report does not universally align with the EHR Incentive Payment Program requirements. HHS/CMS therefore clarified that while States may rely on Medicare Cost Report Data, they are nevertheless charged, along with the hospital, with ensuring the integrity and regulatory compliance of the data submitted. See, Ex. 3. The following example illustrates the complications of strictly relying on Medicare Cost Report data. During the pre-payment calculation of incentive payments, hospitals were instructed to utilize an eligible hospital worksheet that was based on CMS guidance. The worksheet instructed hospitals to use CMS 2552-96, S-3 Part 1, Column 5, Lines 1, 2, 6-10 to determine the number of Medicaid inpatient bed days. The instructions for line 2, however, allowed hospitals to include Medicaid eligible days for which no payment was received. This was in direct contravention to the Final Rule and the Medicaid Act [See, 42 U.S.C. § 1396(b)(t)(5(C)] which only authorized the inclusion of paid inpatient Medicaid days in the Medicaid inpatient bed days portion of the Medicaid share formula which is a significant part of the Medicaid EHR incentive payment calculation. AHCCCS was clearly vested with the requisite authority to conduct post incentive payment audits and in so doing was required

to look behind the data included on a Medicare Cost Report in support of the hospital attestation. This conclusion is supported by HHS OIG. In its findings [See, Ex. 18] HHS OIG instructed AHCCCS to review the supporting schedules and detail for compliance with federal and state regulations in relation to the Medicaid EHR Incentive Payment Program.

More, the need for a detailed review of APPELLANT'S Medicare Cost Report data is underscored in this matter. Based on its ePIP submissions, APPELLANT'S Medicare Cost Report data resulted in a preliminary Aggregate Medicaid EHR Incentive Payment of $0.00. The HHS OIG audit for APPELLANT, however, indicated that the appropriate aggregate payment should be $0.00. Thus, APPELLANT nonsensically disputes the appropriateness of AHCCCS' review of APPELLANT'S Medicare Cost Report supporting data while concurrently arguing for AHCCCS' imposition of the HHS OIG overpayment determination. Notably, the HHS OIG overpayment determination itself represents a review of APPELLANT'S Medicare Cost Report supporting data that resulted in necessary adjustments to the data included in the incentive payment calculation.

Second, and despite positions asserted in its grievance, APPELLANT has already identified to AHCCCS its disagreement with the HHS OIG findings and, in essence, APPELLANT'S alignment with AHCCCS' methodology for calculating NICU. For instance, at Attachment XXX (X) in its May 17, 2017 letter to AHCCCS, APPELLANT identifies its' calculated base year discharges for hospital acute inpatient care as XXXX thereby affirming that the HHS OIG calculated base years discharges of XXXX are erroneous. See, Ex. 24. Therein, APPELLANT also identifies its total inpatient bed days as XXXX. Id. APPELLANT'S total inpatient bed days are identical to the number of inpatient bed

days derived by AHCCCS and utilized in AHCCCS' calculation of APPELLANT'S EHR incentive payment. The total number of acute bed days includes AHCCCS' identification of NICU days (as revenue code 174) as well as those excluded as low-level nursery (i.e., revenue codes 017x, not equal to 4). It appears mathematically impossible for APPELLANT to have attained an identical number of total acute bed days unless it had applied the same methodology utilized by AHCCCS.

Of equal importance is that while APPELLANT has identified that it disagrees with AHCCCS' aggregate incentive payment calculation of $0.00 that results in the overpayment set forth in the Notice, it has similarly stated its disagreement with the HHS OIG aggregate calculation of $0.00. APPELLANT calculates its aggregate incentive payment as $0.00. So, while APPELLANT may not agree with AHCCCS, it is clear that neither AHCCCS nor APPELLANT agrees with HHS OIG. Reliance on the HHS OIG overpayment determination is, therefore, a far less than optimal approach.

Finally, AHCCCS' need to conduct its own audit and impose its findings is represented by a review of the APPELLANT'S HHS OIG audit findings. Federal law governing the EHR Medicaid Incentive Payment Program requires the exclusion of low-level nursery (i.e., non-acute care) in the calculation of discharges and inpatient days. As part of its incentive payment calculation however, HHS OIG *included* level II (i.e., low-level nursery not billed to revenue code 174) in its base year discharges **but** *excluded* the same low-level nursery in its inpatient bed days. The EHR incentive payment calculation relies upon a consistent application of non-acute care across the growth rate and the Medicaid share calculations. Thus, while the inclusion of low-level nursery is inconsistent with AHCCCS policy and an individual basis to reject the audit recommendation, the error

is materially compounded by HHS OIG's failure to apply its utilized inappropriate definition consistently across the entire EHR incentive payment calculation. As such, the HHS OIG overpayment that was determined for APPELLANT suffers from multiple fatal flaws making it an unsustainable basis for the calculation of APPELLANT'S EHR incentive payment. Law also supports this conclusion. See, HHS OIG Report (noting that it is a recommendation and failing to cite authority for imposing the recommendation); Final Rule at 44515 (noting that approval of Medicaid EHR Incentive Payment Program documents does not relieve State of their program integrity duties or responsibilities). In consideration of the foregoing, it was both necessary and appropriate for AHCCCS to independently audit APPELLANT and in so doing to use hospital records encompassing patient level detail documentation to calculate the paid Medicaid days and discharges used to calculate the final aggregate Medicaid EHR incentive payment.

D. AHCCCS is Not Unjustly Enriched by APPELLANT'S stated Overpayment

That AHCCCS is required by federal laws governing all aspects of the Medicaid program to recoup or otherwise recover and return to HHS/CMS Medicaid sums improperly paid to providers needs no citation. The EHR Incentive Payment Program is no different. Reasoned to its natural conclusion, AHCCCS is undeniably not unjustly enriched by application of its program methodology. All EHR Incentive Payment Program overpayments that have been identified by AHCCCS have been reported to, and accounted for with, HHS/CMS. The difference between the APPELLANT'S HHS OIG and AHCCCS overpayment determinations will not be retained by AHCCCS.